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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Federal-State Joint Board on)
Universal Service)

CC Docket No. 96-45

REPLY COMMENTS

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys, hereby submits its reply comments in connection with pending petitions for reconsideration or clarification of the *Report and Order* in this proceeding.^{1/}

WCA is the trade association of the wireless cable industry, a participant in the highly-competitive video programming distribution marketplace. Its members include wireless cable operators, as well as the licensees of Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") stations that lease capacity to wireless cable operators for the transmission of video programming and ancillary services to subscribers. As such, WCA has a vital interest in assuring that the rules and policies governing universal service support are fair and equitable to all comparable competitors.

The filings to date emphasize the importance of competitive neutrality in the implementation of the universal service support programs. *See, e.g.* Petition for Clarification or Reconsideration of GE American Communications, CC Docket No. 96-45, at 11-12 (filed July 17, 1997). WCA agrees that the Commission must assure that similar services are

¹ See *Federal-State Joint Board on Universal Service*, FCC 97-157, CC Docket No. 96-45 (rel. May 8, 1997).

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treated similarly in implementing universal service. Yet, the wireless cable industry may not be receiving the requisite equitable treatment. To the contrary, as WCA explained in an August 29, 1996 submission to the Commission, there is a pressing need for the Commission to maintain competitive neutrality by confirming that MDS and ITFS licensees that lease their facilities to wireless cable operators for the transmission of video programming over state lines are not required to contribute to universal service support programs pursuant to Section 54.703 of the Commission's Rules.^{2/}

Simply stated, it is WCA's view that neither wireless cable system operators nor the MDS and ITFS licensees that lease their facilities to wireless cable system operators provide "telecommunications" for purposes of Section 54.703 of the Commission's Rules. Last week, however, representatives of WCA members were advised by the Commission's staff that, while wireless cable system operators are not considered to be engaged in the provision of a telecommunications service, MDS and ITFS licensees will be considered to be engaged in interstate telecommunications when they lease their facilities to wireless cable operators for the transmission of video programming over state lines. WCA respectfully disagrees with that analysis.

WCA's position is grounded in the Commission's May 8, 1997 *Report and Order* adopting Section 54.703. In Paragraph 781, the Commission attempted to clarify what constituted the provision of "telecommunications" in the video environment by stating that:

² See Letter to William F. Caton, Secretary, from Paul J. Sinderbrand, counsel to WCA, CC Docket No. 96-45 (filed Aug. 29, 1997).

We . . . clarify that satellite and video service providers must contribute to universal service only to the extent that they are providing interstate telecommunications services. Thus, for example, entities providing, on a common carrier basis, video conferencing services, channel service or video distribution to cable head-ends would contribute to universal service. Entities providing open video systems (OVS), cable leased access, or direct broadcast satellite (DBS) services would not be required to contribute on the basis of revenues derived from those services.

Report and Order, at ¶ 781. Because this language was by its very terms intended to provided guidance through examples rather than constitute an exhaustive list, and because MDS and ITFS licensees engaged in leasing to wireless cable system operators are akin to telephone companies leasing OVS capacity and cable system operators providing leased access, it appeared that such MDS and ITFS licensees would not be considered to be providers of “telecommunications.”^{3/}

That the Commission did not intend for MDS and ITFS licensees to be subject to universal service support obligations is further evidenced by the Final Regulatory Flexibility Analysis contained within the *Report and Order*. Although the Commission devotes approximately twenty pages of the *Report and Order* to descriptions of the potential impact of the new rules on a myriad of different classes of entities, *there is no mention whatsoever*

³ The only other reference in the *Report and Order* to this issue is in Paragraph 796, where the Commission addressed its exercise of permissive authority to require those who provide telecommunications services on a non-common carrier basis to contribute to universal service support programs. There, the Commission stated that “[w]e reiterate that cable leased access providers, OVS providers, and DBS providers would not be required to contribute pursuant to our permissive authority to require contributions from providers of interstate telecommunications.” The use of term “reiterate” by the Commission implies that the Commission was referring back to its finding in Paragraph 781 that cable leased access providers, OVS providers and DBS providers are not engaged in the provision of “telecommunications,” for there is no other discussion of these classes of service providers in the *Report and Order*.

of MDS, ITFS or wireless cable! Since the Commission has consistently acknowledged that MDS and ITFS licensees are generally small business entities,^{4/} this omission can only be explained as reflecting the Commission's recognition that MDS and ITFS licensees do not provide telecommunications when they lease their facilities to wireless cable system operators and would not be affected by the *Report and Order*.^{5/}

Despite these clear indications that MDS and ITFS licensees would not be considered to engage in the provision of telecommunications when they lease their facilities to a wireless cable operator (and thus would be treated similarly to others who are similarly situated), the staff is now taking a contrary view. The staff's current position can be traced to an *Erratum* released by the Common Carrier Bureau approximately a month after the *Report and Order* adding two virtually identical sentences to Section 54.703(b) and (c) of the Commission's Rules.^{6/} As amended by the *Erratum*, the text of those subsections reads as follows, with the added language highlighted:

(b) Every telecommunications carrier that provides interstate telecommunications services, every provider of interstate telecommunications that offers telecommunications for a fee on a non-common carrier basis, and

⁴ See e.g., *Telecommunications Services; Inside Wiring; Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, CS Docket No. 95-184, FCC 97-304, at ¶¶ 94-96 (rel. Aug. 28, 1997); *Closed Captioning and Video Description of Video Programming*, MM Docket No. 95-176, FCC 97-279, at ¶¶ 272-74 (rel. Aug. 22, 1997).

⁵ Indeed, given the Commission's failure to consider the potential impact of the *Report and Order* on small MDS and ITFS licensees, the Commission may be barred from enforcing Section 54.703 against them. See 5 U.S.C. § 611 (1996).

⁶ See *Federal-State Joint Board on Universal Service*, FCC 97-157, CC Docket No. 96-45, at 7 (CCB rel. June 4, 1997).

payphone providers that are aggregators shall contribute to the programs for eligible schools, libraries, and health care providers on the basis of its interstate, intrastate, and international end-user telecommunications revenues. *Entities providing open video systems (OVS), cable leased access, or direct broadcast satellite (DBS) services are not required to contribute on the basis of revenues derived from those services.*

(c) Every telecommunications carrier that provides interstate telecommunications services, every provider of interstate telecommunications that offers telecommunications for a fee or a non-common carrier basis, and payphone providers that are aggregators shall contribute to the programs for high cost, rural and insular areas, and low-income consumers on the basis of its interstate and international end-user telecommunications revenues. *Entities providing OVS, cable leased access, or DBS services are not required to contribute on the basis of revenues derived from those services.*

In essence, the staff's position is that, although the listing of OVS, cable leased access and DBS in Paragraph 781 as not constituting "telecommunications" appears to be illustrative, the addition of these two sentences to Section 54.703 evidences the Commission's intent that all other satellite and video providers must contribute support.


WCA disagrees with that analysis, which appears to ignore the fundamental principle of competitive neutrality. By its very terms, Section 54.703 is only applicable to those who engage in telecommunications. The clear import of Paragraph 781 of the *Report and Order* is that those who lease facilities for the distribution of video programming directly to subscribers are not engaged in telecommunications. Read in context, the specific enumeration of OVS, cable leased access and DBS in Paragraph 781 was intended as illustrative, not definitive. It is patent that the leasing of facilities to video programming distributors by MDS and ITFS licensees is indistinguishable from the three specific examples listed in Paragraph 781. If the lessor of OVS facilities to a video programming distributor

is not engaged in telecommunications, and if the lessor of cable facilities to a video programming distributor is not engaged in telecommunications, how can the lessor of MDS or ITFS facilities to a video programming distributor be engaged in telecommunications? There is no meaningful distinction, and both law and public policy requires that similar entities be treated similarly.

For these reasons, WCA respectfully requests that the Commission clarify that MDS and ITFS licensees engaged in leasing facilities that operate across state lines to wireless cable system operators are not engaged in "telecommunications."^{7/}

Respectfully submitted,

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⁷ Based on an informal canvass of the wireless cable industry late last week following the surfacing of this issue, WCA believes that few, if any, ITFS or MDS licensees will be filing Universal Service Worksheets today because they did not believe they were engaged in the provision of "telecommunications." Should the Commission determine that MDS and ITFS licensees that lease facilities for the interstate transmission of video programming are required to contribute to the universal service support programs, fundamental fairness dictates that MDS and ITFS licensees be afforded an additional opportunity to file without penalty.